90-566

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

In the Supreme Court of the United States

September Term, 1990

JOSEPH HUMENIK,
Petitioner

v.

OWENS-CORNING FIBERGLAS CORPORATION,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When a conflict exists between a state substantive statute and a Federal Rule of Evidence in a diversity case, should the state substantive law take precedence?

A. Did the Third Circuit err by failing to conduct a plenary review of the trial court's choice of law?

B. Did the Third Circuit decide this case in direct conflict with the First Circuit's decision in *Carota v. Johns-Manville Corp.*, 893 F.2d 448 (1st Cir. 1990)?

C. Did the trial court and the Third Circuit err by failing to rule under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that the Pennsylvania statute should apply?

D. Did the trial court and the Third Circuit err by failing to rule that the Pennsylvania statute created a privilege under F.R.E. 501?

II. Did the lower court err by allowing plaintiff to be cross-examined about pretrial settlements with co-defendants in violation of F.R.E. 408?

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LIST OF PARTIES TO PROCEEDING IN THIRD CIRCUIT NO. 90-1075

1. Plaintiff/Appellant Joseph Humenik
2. Defendant/Appellee Owens-Corning Fiberglas Corporation

LIST OF PARTIES TO PROCEEDING IN THE U.S. DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA CA87-1899[1]

1. Plaintiff Joseph Humenik
2. Owens-Corning Fiberglas Corporation
3. Celotex Corporation

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Humenik respectfully asks that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit filed on June 29, 1990.

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[1] All other named defendants in CA87-1899 had settled or were in bankruptcy (Raymark) or had been dismissed by the time of trial (Uni-Royal). Johns-Manville Corporation was protected form joinder by the Bankruptcy Court and, therefore, was not a party.

STATEMENT OF JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Third Circuit was filed on June 29, 1990. No Petition for Rehearing was filed. This Petition for Writ of Certiorari was timely filed within 90 days thereafter as provided by Supreme Court Rule 13.1. The statutory provision which confers jurisdiction on This Court to review the judgment of the United States Court of Appeals for the Third Circuit by Writ of Certiorari is 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

Federal Rule of Evidence 408: **Compromise and Offers to Compromise**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ARTICLE V. PRIVILEGES
Federal Rule of Evidence 501: **General Rule**

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

42 Pa.C.S.A. § 6141:

(a) Personal injuries. - Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) Admissibility in evidence. - Except in action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

REPORTS OF OPINIONS BELOW

The instant matter was tried from August 1-4, 1989, before the Honorable Clifford Scott Green and a jury in the U.S. District Court for the Eastern District of Pennsylvania. Judge Green's Opinion which was filed January 12, 1990 and which denied plaintiff's post-trial motions is not reported. It is reproduced as Appendix A. The Opinion of the Court of Appeals for the Third Circuit which upheld Judge Green's Order was filed on June 29, 1990, and is not reported. It is reproduced as Appendix B.

STATEMENT OF THE CASE

Plaintiff/Petitioner Joseph Humenik served in the United States Navy aboard the *USS Albany* in the Engineering Department of the ship from 1952-1956. (Record 017-018, 027). During the course of that employment he removed and installed asbestos products and was exposed to asbestos dust emitted by these products. (Record 018-027). He was advised at a pre-employment physical at the Philadelphia Gas Works that he had contracted the disease of asbestosis. (Record 031-032). He filed suit in the United States Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1332.

There was complete diversity of citizenship between the parties and the amount in controversy exceeded $10,000.00.[2] Plaintiff is a resident of Pennsylvania. All

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[2] This action was filed prior to the amendment to 28 U.S.C. §1332, raising the jurisdictional minimum to $50,000.00. In any event, upon retrial, this case would exceed the jurisdictional

defendants are incorporated in and have primary places of business in states other than Pennsylvania.

The only person to identify Owens-Corning asbestos products at the trial was Mr. Humenik. (Record 024, 047-049). Consequently, his credibility was critical in regard to product identification and it was important for Owens-Corning to attack his ability to identify the asbestos products he used. Owens-Corning chose to do this, in part, by questioning him with regard to pretrial settlements.

The ostensible purpose of this questioning was to demonstrate that because Mr. Humenik had settled with most of the defendants before trial, he was "biased or prejudiced" against Owens-Corning to such an extent that he changed his testimony to Owens-Corning's detriment.[3] Further, if he changed his testimony about

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damages requirement.

[3] Since the testimony at Mr. Humenik's deposition and the trial was substantially similar, this offer of proof was baseless. During the time period from 1952-1956 when Mr. Humenik was exposed to asbestos products, only one manufacturer with the name "Corning" made or distributed asbestos products, Owens-Corning Fiberglas Corporation. At a later time, Owens-Corning justified their line of questioning by arguing that Mr. Humenik might have "confused" Owens-Corning with either Corning Glass Works or Pittsburgh-Corning Corporation. This is a groundless justification of the prejudice which ensued. Neither Corning Glass Works nor Pittsburgh-Corning Corporation manufactured or distributed asbestos products during the period 1952-1956. For that reason, plaintiff did not sue either of these companies. Likewise, Owens-Corning did not join either of them as third party defendants. The only "evidence" of these entities' association with asbestos products has come from counsel for Owens-Corning, both during closing argument at trial and in the Third Circuit brief. In view of the lack

this one important issue, the jury could conclude that his testimony about everything else was questionable. There is no doubt, however, that the questioning overtly informed the jury that Mr. Humenik had received monies from other defendants.[4]

The prejudicial effect of this questioning was magnified by the posture of most of the pretrial settlements.[5] Mr. Humenik truly did not know the exact terms of the settlements since they had not been reduced to writing. Thus, his repeated answers of "I don't know" were borne of his understandable ignorance. Plaintiff's answers, though, made him seem like a liar to the jury. He was forced into the untenable position of either

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of evidence in the record, it is inexplicable why the Third Circuit adopted this rationale as justification for the cross-examination under F.R.E. 408. See Appendix B at 26.

[4] Prior to trial, Plaintiff had only received settlement monies from two defendants, Eagle-Picher, Inc. and Carlock, Inc. Eagle-Picher pleaded Plaintiff's joint-tortfeasor release prior to trial to justify its absence. (Record 191). This release conforms to the Pa. Uniform Contribution Among Joint Tortfeasors Act, 42 Pa.C.S.A. § 8321, ff., and the case of *Charles v. Giant Eagle Markets*, 513 Pa. 474, 522 A.2d 1 (1987).

[5] Mr. Humenik settled with Owens-Illinois and the Center for Claims Resolution, which included defendants Dana Corporation, Flexitallic Gasket Company, GAF Corporation, Keene Corporation, National Gypsum Company, Turner and Newall, Ltd. and United States Gypsum Company, shortly before trial. No Releases had been signed nor had any money changed hands before trial. Plaintiff could not personally identify any of these settled defendants and had never done so. Mr. Humenik orally approved the settlements before they were made. (Record 176-177).

having to explain why he did not know the amounts of or the fact of pretrial settlements or having the jury decide the case on the basis of the evidence which they heard.

Plaintiff entered into the pretrial settlements and tried the case believing that such settlements were governed by Pennsylvania law[6], 42 Pa.C.S.A. § 6141. Mr. Humenik's credibility before the jury was understandably devastated by this cross-examination. Plaintiff requested a mistrial on August 2, 1989. The denial of that mistrial request and the Third Circuit's upholding of the trial court's ruling is the subject matter of this Petition for Writ of Certiorari.

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[6] The trial court ruled that this diversity case would be governed by Pennsylvania law.

REASONS FOR GRANTING WRIT OF CERTIORARI

Certiorari should be granted to the Third Circuit Court of Appeals to resolve the question of whether state statutes or case law prohibiting the introduction of evidence of plaintiff's settlements with settled joint tortfeasors are admissible in the trial against unsettled defendants. The Third Circuit decision in this case conflicts with a decision of the First Circuit concerning whether such state law is substantive, and thus applicable to diversity trials under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Further, even as a procedural matter, this Court has not ruled on the breadth of F.R.E. 408. Given the large number of lawsuits which now exist with multiple defendants, it is likely that this question will arise frequently.

I. THE THIRD CIRCUIT AND THE TRIAL COURT ERRED BY FAILING TO APPLY PENNSYLVANIA'S STATUTE WHICH ABSOLUTELY PROHIBITS INTRODUCTION OF EVIDENCE OF PLAINTIFF'S SETTLEMENTS WITH OTHER CODEFENDANTS.

A. The Third Circuit adopted the wrong legal standard for reviewing the lower court's choice of law ruling.

The Third Circuit stated in its opinion, "Our review of a district court's evidentiary rulings and denial of a motion for new trial is under the abuse of discretion standard." [Citation omitted.] Appendix B at 22. This was error. Before making the evidentiary ruling, the trial court had to make a choice of law ruling based on whether the issue was substantive or procedural. This

threshold ruling should have been subject to plenary review.[7]

Under settled principles of law decided by this Court since *Erie Railroad Co. v. Tompkins*, supra., the issue should have been subject to plenary analysis as to whether it was substantive or procedural prior to the evidentiary ruling. For the reasons set forth below the issue was substantive, and the Third Circuit erred by allowing the trial court to ignore the Pennsylvania Statute.

The Third Circuit stated that it "decline(d) to adopt a standard which would seriously impair the uniform evidentiary procedures in the federal courts." The Third Circuit went on to state, citing *Salas by Salas v. Wang*, 846 F.2d 897 (3d Cir. 1988), that the Federal Rules of Evidence are "largely procedural" and the federal courts "must apply the Federal rules so long as they can rationally be viewed as procedural." *Salas*, supra. at 905-06.

The standard of review used by the Third Circuit, combined with its view of the Federal Rules of Evidence as "largely procedural," ensures that a district court can never be reversed by following those rules. Put differently, a judge cannot abuse his discretion by following the federal rules. It is respectfully suggested that this approach has the potential for removing the underpinnings of the *Erie* doctrine. So long as any conflict of law

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[7] Plaintiff would ordinarily ask for a remand to the Third Circuit for it to apply the proper standard. However, it is apparent that the Third Circuit would view the issue as "procedural" and would affirm the application of F.R.E. 408 instead of the Pennsylvania statute even under plenary review. See *Slip Op.*, Appendix B at 24. For the reasons which follow, the issue was substantive.

is deemed an "evidentiary" matter, which is "largely procedural," state law will be disregarded in federal court. The result of this policy will be the development of Federal common law under the rubric of "evidence." The Third Circuit's stated purpose for its decision in this case was to encourage uniformity of evidentiary practices in federal courts. However, this objective can only be achieved by disregarding the substantive law of the several states.

B. The Third Circuit's analysis and holding directly conflict with the First Circuit's decision in *Carota v. Johns-Manville Corp.*, 893 F.2d 448 (1st Cir. 1990).

The analysis of the Third Circuit is directly opposite of that used by the First Circuit in *Carota*, supra. It is not surprising, therefore, that the respective Circuits reached different conclusions. In a similar asbestos disease trial, the First Circuit held that the issue was substantive and Massachusetts case law applied.

Unless this Court resolves this conflict, the lower courts will be free to characterize the issue in a manner which ensures that the outcome most desired by such courts will be reached. Courts will be licensed to make rulings which will be as uniform as the "federal common law" which existed before the *Erie* decision. The labeling of an issue as "evidentiary" begs the question of whether the issue is substantive or procedural. If the federal courts are mandated to conduct trials as though they were state courts, then state substantive statutes must take precedence over Federal rules, as the First Circuit ruled in *Carota*.

C. Under *Erie*, the Pennsylvania statute should have taken precedence over the Federal Rule of Evidence.

For the last fifty-two years, diversity trials in Federal Courts have been governed by state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).[8] In addition to the case law under *Erie*, supra, two Federal statutes also require Federal Courts to apply state law to substantive issues in diversity cases. The Rules of Decision Act, 28 U.S.C. § 1652, provides that the laws of the several states[9] shall be regarded as rules of decision in civil actions in the courts of the United States. Further, the Federal Rules Enabling Act, 28 U.S.C. § 2072, requires that a federal rule must be measured against the federal statutory requirement that it not abridge, enlarge, or modify any substantive right. See *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 101 L.Ed.2d 2229 (1988).

The distinction between substance and procedure in a particular case, however, can be extremely difficult to make and may depend upon the standard which is used. However, in this case, the matter is substantive under any legal test. One of the most frequently-used tests to distinguish substance from procedure is the "outcome-determinative" test which was enunciated in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). The principle is that "the outcome of the litigation in the

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[8] It is also necessary that the Federal court carry out the public policy of the state where it is located. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 120, 85 L.Ed. 1477 (1941).

[9] Under F.R.C.P. 81(e), the term "laws of the several states" includes both statutes and judicial decisions.

federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* at 109. Further, in applying this test, the Third Circuit has stated "it is the effect of a legal rule on the outcome of a case, not the forum's purpose in adopting it, which controls the *Erie* issue." *Fauber v. KEM Transportation and Equipment Co., Inc., et al.*, 876 F.2d 327, 1989 U.S. App. LEXIS 7375 at [*9] (3rd Cir. 1989).[10]

It is obvious that the evidence regarding pretrial settlements affected the outcome of this case and that the evidence would have been excluded in a Pennsylvania trial court. 42 Pa.C.S.A. § 6141; *Wilkerson v. Allied Van Lines*, 360 Pa.Super. 523, 521 A.2d 25 (1987), appeal dismissed, 518 Pa. 61, 540 A.2d 268, cert. denied, 109 S.Ct. 78, 102 L.Ed.2d 54. Consequently, using the outcome-determinative test, the Pennsylvania statute was controlling, and the trial court's failure to follow the state statute was prejudicial.

Yet another approach is the test set forth in *Hanna v. Plumer*, 380 U.S. 460 (1965). The test there was:

> . . . whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against the citizens of the forum state, or whether application of the

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[10] In *Fauber*, supra, this Court determined that Pa.R.C.P. 238 was substantive and was applicable to diversity cases. This rule provides for pre-judgment interest. The label or characterization of the rule or statute was unimportant in making the outcome determination. *Id.*, 1989 U.S. App. LEXIS 7375*8, *11-12, citing *Monessen Southwestern Ry. v. Morgan*, 108 U.S. 1837 (1988).

> rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a Plaintiff to choose [a forum].
>
> *Id.*, 380 U.S. at 468 n.9.

In this case, the character of the litigation is tremendously affected because the decision about whether or not to settle with a particular defendant before trial, and in what amount, is determined in large part by the effect that the settlement will have upon trial. Thus Plaintiffs would most likely choose Pennsylvania state court over Federal court because of this significant difference in the litigation's character and result.

A third approach is to analyze the respective policies of the conflicting rules. This is the approach which was followed by the First Circuit in *Carota v. Johns-Manville Corp.*, supra. In *Carota*, Plaintiff brought an asbestos products lawsuit in Federal court. Defendant argued that Massachusetts decisional law allowed it to present evidence of the fact and amount of pretrial settlements to the jury. Plaintiff argued that F.R.E. 408 required exclusion of pretrial settlements. The First Circuit found that the substantive-procedural dichotomy could not be solved by traditional *Erie* analysis. Therefore, it applied *Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18 (1st Cir. 1987), which held that the state rule need not always displace the federal rule unless application of the federal rule impinged upon a substantive state policy embodied in the state rule. *Id.* at 21. The First Circuit determined that the Massachusetts state policy of prevention of double recovery was clear, and that the policy had to be carried out by admission of the evidence

in question. *Carota*, supra., at 450.

Pennsylvania's policy is directly contrary to that of Massachusetts, but it is equally clear. In *Charles v. Giant Eagle Markets*, 513 Pa. 474 522 A.2d 1 (1987), the Pennsylvania Supreme Court allowed Plaintiff to keep the amount of money paid in excess of the settling defendant's pro rata share determined by the jury. To do otherwise, the Court reasoned, would defeat the policy of encouraging pretrial settlements. The unsettled defendant, therefore, was ordered to pay its pro rata share determined by the jury under the Comparative Negligence Act, 42 Pa. C.S.A. § 7102, even though Plaintiff received more than the verdict amount. Since Pennsylvania's policy is to encourage pretrial settlements by, among other incentives, excluding the fact and amount of such settlement at trial of the unsettled codefendants, the issue is substantive, and the lower court's failure to carry out this policy was erroneous.

An alternative approach is that enunciated in *McCollum Aviation Inc. v. CIM Associates*, 438 F. Supp. 245 (S.D. Fla. 1977). That Court adopted the analysis suggested by Professor Ely in "The Irrepressible Myth of *Erie*," 87 Harv.L.Rev. 693, 718 (1974). Professor Ely holds that a legal right is substantive if it would affect a person's conduct prior to onset of litigation and it has no design to manage ongoing litigation. Under this test, the Pennsylvania statute affords substantive rights. Pretrial settlements are always based upon considerations of the level of proof required to prove defendants liable and the effect that such settlements might have upon trial of the unsettled codefendants. Because a plaintiff's conduct before trial is governed by these considerations, the statutes or rules affecting pretrial settlements are substantive. Since plaintiff's choice of forum would also be

affected by the ability to exclude prior settlements as evidence and force unsettled defendants to prove the respective liability of settled co-defendants, the Pennsylvania law is substantive.

By allowing the cross-examination of plaintiff regarding pretrial settlements, the lower court disregarded Pennsylvania law and policy and rendered Plaintiff's choice of forum the major element in the outcome of his lawsuit. In exalting an exception to the Federal Rule of Evidence 408 above not only the basis of the rule itself as well as above state substantive law, the Third Circuit violated *Erie*.

D. The Pennsylvania statute created a privilege which should have been applicable under F.R.E. 501.

F.R.E. 501 expressly provides that, where an element of a claim or defense as to which State law supplies the rule of decision, the privilege is determined pursuant to state law. It should be noted that since the issue is the ability to collect on a state law claim, this rule requires application of state substantive law. The Pennsylvania statute, 42 Pa.C.S.A. § 6141, creates a privilege which is absolute. That is, evidence of pretrial settlements with other joint tortfeasors cannot be admitted against Pennsylvania plaintiffs. The Third Circuit should have followed the state statute with regard to this evidentiary privilege.

II. THE THIRD CIRCUIT AND TRIAL COURT MISINTERPRETED F.R.E. 408.

The trial court and the Third Circuit focused upon the exception to F.R.E. 408 rather than its substance. Rule 408 is an *exclusionary* rule: It mandates that evidence of pretrial settlements should be excluded except to prove bias or prejudice. In focusing on *Montone v. Radio Shack*, 698 F.Supp 92 (EDPa. 1988), the Third Circuit ignored the important holdings in *McShain v. Cessna*, 563 F.2d 632 (3d Cir. 1977), and *Young v. Verson Allsteel Corp.*, 539 F.Supp 193 (EDPa., 1982). These two cases stand for the proposition that in order to support the introduction of plaintiff's pretrial settlements with co-defendants the non-settling defendant must show something more than the mere fact of settlement.

McShain, supra, highlights how limited the exception is. In that case, plaintiff settled with one defendant for a nominal sum in order to obtain the testimony of one of that defendant's employees as his [plaintiff's] expert witness. The non-settling defendant's theory of the case was that the settled defendant was entirely liable for the accident and it presented evidence to that effect. Thus, the admission of the pretrial settlement with the co-defendant was necessary to show that Plaintiff's expert witness was biased.

Owens-Corning failed to prove anything through the introduction of evidence of pretrial settlements other than the fact that they existed. Owens-Corning's efforts were designed to question plaintiff's credibility by prejudicing plaintiff, and its efforts were rewarded by the jury. Under the Third Circuit's view of the present case, a plaintiff could always be questioned with regard to

"bias or prejudice" on the grounds that he made a pretrial settlement with another defendant. Thus the rule would be swallowed by its exceptions.

CONCLUSION

For the above reasons, it is respectfully requested that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

PAUL, REICH & MYERS

BY:_____
RICHARD P. MYERS

APPENDIX A

OPINION OF THE TRIAL COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

HUMENIK, JOSEPH L.

VS.

CELOTEX CORPORATION,
OWENS-CORNING FIBERGLAS CORPORATION,
ET AL.

CIVIL ACTION 87-1899

ORDER

Pending before the court are "Plaintiff's Post-Trial Motions" for the grant of a new trial because of alleged errors committed by this court in applying the substantive law of Pennsylvania, and the Federal Rules of Evidence to this controversy. Also, challenged is the directed verdict entered in favor of Celotex at the close of plaintiff's evidence. I stated of record the basis for these rulings and now reaffirm the rulings heretofore made for the reasons so stated. The unanimous findings of the jury regarding issues of strict liability, negligence and causation are not against the weight of the evidence. Plaintiff simply failed in his burden of proof. Thus,

plaintiff is not entitled to the post-trial relief requested.[1]

Accordingly, this 11th day of January, 1990, IT IS ORDERED that plaintiff's post-trial motions are DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.

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[1] Neither Owens-Corning Fiberglas Corporation nor its alleged supplier of asbestos product, Owens-Illinois, were found to have supplied defective asbestos product to which plaintiff was exposed and which contributed to plaintiff's asbestos cause disease. Accordingly, the indemnification claim of Owens-Corning against Owens-Illinois is not addressed.

APPENDIX B

OPINION OF THE THIRD CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1075

JOSEPH L. HUMENIK,
Appellant

v.

CELOTEX CORPORATION
DANA CORPORATION
EAGLE PICHER INDUSTRIES, INC.
FIBREBOARD CORPORATION
FLEXITALLIC GASKET
GAF CORPORATION
GARLOCK INC.
KEENE CORPORATION
NATIONAL GYPSUM
OWENS-CORNING FIBERGLAS CORPORATION
OWENS-ILLINOIS GLASS
RAYMARK INDUSTRIES, INC.
TURNER & NEWALL, LTD.
UNIROYAL
U.S. GYPSUM
OWENS-CORNING FIBERGLAS CORPORATION
Appellee

APPENDIX B

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 87-01899)
District Judge: Hon. Clifford Scott Green

Submitted Under Third Circuit Rule 12(6)
June 27, 1990

Before: SLOVITER and MANSMANN, Circuit Judges,
and THOMPSON, District Judge, Sitting by designation

(Filed June 29, 1990)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Circuit Judge

Appellant Joseph Humenik appeals from the order of the district court denying his motion for a new trial on his claim for damages against Owens-Corning Fiberglas Corp. (Owens-Corning).

Humenik's claim that he sustained injuries as a result of his exposure to the asbestos products manufactured, distributed, and/or sold by named defendants was tried before a jury. Humenik testified that he was exposed to asbestos products while serving in the Navy from 1952 until 1956 where he was required to rip out old asbestos pipecovering and replace it with other products. At trial he testified that these products were those of Johns Manville and Owens-Corning. App. at

24. In his earlier deposition, Humenik identified "Johns-Manville" and "Corning." App. at 183. At that time Owens-Corning did not manufacture asbestos products but did distribute an asbestos pipecovering called Kaylo, which was manufactured by Owens-Illinois, a different corporation.

In its cross-examination of Humenik, Owens-Corning sought to emphasize the inconsistencies between Humenik's identification of "Corning" in his deposition and his identification of "Owens-Corning" at trial, because there are various other companies with "Corning" in their names. It questioned Humenik about his pretrial settlements with other defendants in an attempt to show that Humenik was biased and that he changed his testimony because of these settlements.

The jury returned a verdict for appellee Owens-Corning and for the other named defendants. The jury, in special interrogatories, found Humenik suffered from an asbestos-caused disease, but found that none of the named defendants' products "were defective and a substantial factor in causing Mr. Humenik's asbestos-related disease."

Humenik filed a motion for new trial alleging, inter alia, that the trial court erroneously allowed him to be cross-examined regarding the existence of pretrial settlements with named defendants other than Owens-Corning. The court denied the motion, and Humenik filed a timely appeal. Our review of a district court's evidentiary rulings and denial of a motion of new trial is under the abuse of discretion standard. See Salas by Salas v. Wang, 846 F.2d 897, 903 (3rd Cir. 1988). We have jurisdiction under 28 U.S.C. § 1291.

Humenik contends that the district court erred in

allowing cross-examination regarding his pretrial settlements with other named defendants because such evidence is precluded under Pennsylvania law. The Pennsylvania statute provides:

> Effect of certain settlements
>
> (a) Personal injuries.--Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.
>
> (c) Admissibility in evidence.--Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of the matter.

42 Pa. Cons. Stat. Ann § 6141(a) and (c).

Humenik maintains that because the basis of federal jurisdiction in this case was diversity of citizenship, under

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the district court should have applied the state rule concerning the inadmissibility of pretrial settlement evidence. We disagree. We decline to adopt a standard which would seriously impair the uniform evidentiary procedures in the federal courts.

As we stated in Salas, the Federal Rules of Evidence are "largely procedural," and the federal courts "must apply the federal rules so long as they can rationally be viewed as procedural." 846 F.2d at 905-06 (footnote omitted). In a careful analysis of this issue, the court in Montone v. Radio Shack, 698 F. Supp. 92 (E.D.Pa. 1988), stated that "in a diversity case, when a federal court finds that state evidentiary law would exclude certain testimony whereas federal evidentiary law would admit it, the court must follow federal law unless one of the Federal Rules of Evidence expressly invokes state law." Id. at 93. The court further noted that although some federal courts have admitted evidence otherwise excludable under federal law, no instances appear to have surfaced excluding evidence on that basis. Id. at 93 n.l. Indeed, in Carota v. Johns-Manville Corp., 893 F.2d 448, 451 (1st Cir. 1990), the court applied the Massachusetts state law allowing evidence of pretrial settlements in a diversity case.

In this case, the state and federal policies regarding pretrial settlement evidence are not substantially different, as they were in Carota. Evidence of out-of-court settlements with joint tortfeasors is generally inadmissible even under the applicable federal rule, see Fed. R. Evid. 408; Advisory Committee Notes to Rule 408, unless the testimony is elicited for the purpose of impeaching a witness' credibility. We do not regard this difference as

so seriously impinging upon a state substantive right as to require application of the state's strict non-admission policy.[1]

Accordingly, both because we view Rule 408 as procedural and therefore applicable in a diversity case and because we do not think the policies underlying the small difference between the applicable federal and state rules are so strong as to affect substantive rights of litigants, we conclude that the district court did not err as a matter of law in applying the Federal Rule of Evidence.

Humenik argue that even under Fed. R. Evid. 408, the cross-examination should not have been permitted. Rule 408 provides:

Evidence of (1) furnishing oroffering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does

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[1] In fact in Weingrad v. Phila. Elec. Co., 324 Pa. Super. 16, 471 A.2d 100 (1984), the Pennsylvania Superior Court noted its approval of the federal rule: "It is the opinion of this court that the public policy of promoting settlements would not be frustrated by a law [such as Wisconsin's which is substantially a state adoption of Rule 408] which permits the admission of evidence of settlements when offered to prove bias or prejudice." Id. at 21 n.3, 471 A.2d at 103 n.3.

not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

Owens-Corning explained that it was seeking to show by the questions concerning settlements that Humenik had a stake in only identifying its asbestos product at trial since he had already settled, or was negotiating settlement, with the majority of the other defendants. It noted that at trial Humenik named Johns-Manville and Owens-Corning whereas in his previous deposition he had identified only "Johns-Manville" and "Corning." This distinction in name is pertinent since there are three other companies having similar names, Owens-Illinois (a named defendant), Pittsburgh Corning, and Corning Glass Works.

Rule 408 codifies a trend in case law that permits cross-examination concerning settlement for the purposes of impeachment. For example, this court in McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 634-635 (3d Cir. 1977)(per curiam), held admissible evidence of a pretrial settlement which released one of the defendants for $10 and the right to obtain one of the released defendant's employees as an expert witness, because the testimony cast doubt upon the released codefendant's impartiality.

APPENDIX B

In this case, the district court held that plaintiff could be cross-examined regarding his pretrial settlements under Rule 408 because the inquiry was directed toward his possible "bias" or "prejudice" and thus fell within the exception provided in the Rule. The court stated, "It is proper under the circumstances to show the receipt of some money which may color plaintiff's testimony." App. at 77.

Under the circumstances of this case, we conclude that the district court did not abuse its discretion in allowing the cross-examination of Humenik regarding the existence of pretrial settlements with other defendants.

For the reasons set forth, we will affirm the judgment of the district court.